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SUPREME COURT, U. S.

No. 72-1484

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

MICHAEL POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner challenges the validity of certain court ordered wiretaps on the ground that the applications for the orders identified the Assistant Attorney General in charge of the Criminal Division as the person within the Department of Justice who authorized its filing when in fact the Attorney General personally did so.

Petitioner and others were charged in an indictment with conspiring to use facilities in interstate commerce to carry on an illegal gambling business in violation of 18 U.S.C. 1952. The primary evidence against petitioner was obtained from a series of court-authorized wiretaps. After his motion to suppress wiretap evidence had been denied by the district court, petitioner entered a plea of guilty to the indictment, reserving the right

to appeal the denial of the motion to suppress.[1] Petitioner was sentenced to four year's probation with incarceration for the first six months.

On appeal the court of appeals affirmed the denial of the motion to suppress with respect to all but one of the wiretaps in petitioner's case, but ordered that evidence obtained from the final wiretap extension order, the application for which had been authorized by the Executive Assistant to the Attorney General, for the Attorney General, should have been suppressed.[2] The court reversed and remanded petitioner's case with instructions to determine if sufficient evidence remained from the other wiretaps not suppressed to support the guilty plea. If so, the conviction would stand (Pet. App. 7-8).[3]

The wiretap evidence in this case was obtained from three court-authorized wiretaps in the Chicago area,

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[1]It is the policy of the Department of Justice not to enter into such agreements permitting guilty pleas to be entered with a reservation of a purported right to appeal on nonjurisdictional grounds. However, we did not below and do not here challenge petitioner's right to raise such issues since the reservation of the right to appeal was made by agreement between the defendant and the prosecutor with the acquiesence of the trial court.

[2]We disagree with that part of the holding in this case suppressing evidence from the wiretap extension authorized by Mr. Lindenbaum but did not petition for a writ of certiorari on that issue in this case.

[3]The decision of the court of appeals in this case was rendered in a consolidated opinion with three other cases in which wiretap evidence was suppressed because the applications had not been personally authorized by the Attorney General. The government has petitioned for certiorari to review that part of the court of appeals decision. See *United States* v. *Roberts*, petition for a writ of certiorari pending, No. 72-1475, this Term.

which in turn depended in part for the showing of probable cause on four prior court-authorized wiretaps in the Detroit area. The general procedure under which the applications were authorized to be submitted is set forth in our petition in *United States* v. *Giordano,* No. 72-1057, certiorari granted, March 26, 1973. In the instant case the government showed by affidavits that all of the wiretap applications were personally approved by then Attorney General John N. Mitchell except the last extension of the Chicago wiretap which was approved by his Executive Assistant, Sol Lindenbaum, exercising the Attorney General's authority under the procedures set forth in our petition in *Giordano.*[4]

Under the standard procedure, after approval in the Attorney General's office, letters were dispatched to the attorney in the field notifying him that he was authorized to apply for the wiretap order. These letters were sent over the name of Assistant Attorney General Will Wilson, and the letter and application seemed to indicate, erroneously, that it was Assistant Attorney General Will Wilson who was authorizing the application. Mr Wilson's signature was affixed to these letters by one of his two Deputy Assistant Attorneys

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[4]Former Attorney General Mitchell personally initialed the memorandum addressed to Assistant Attorney General Will Wilson in the case of the two Chicago wiretaps and three of the four Detroit wiretaps which he personally authorized. In the case of the other Detroit wiretap the Executive Assistant, Mr. Lindenbaum, telephonically informed the Attorney General of the substance of the application request and the Attorney General orally authorized the application. Mr. Lindenbaum then caused Mr. Mitchell's initials to be affixed to the memorandum to Assistant Attorney General Will Wilson. See our memorandum in *Cuzzo* v. *United States,* No. 72-1267, this Term.

General in accordance with the authorization of Mr. Wilson and the standard procedure of the Criminal Division.

Petitioner claims that the evidence from all of the wiretaps should have been suppressed because Assistant Attorney General Will Wilson did not personally sign his name to the letter of authorization to the attorney in the field and because the letter and the application incorrectly identified Assistant Attorney General Wilson as the authorizing officer. He relies on the decision of the Ninth Circuit to that effect in *United States* v. *Chavez,* certiorari granted, May 21, 1973, No. 72-1319.

Since this issue is now pending before this Court in *Chavez,* the Court may wish to defer disposition of the instant case pending resolution of the issue in *Chavez.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06